IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DOUGLAS L. NICKEL, :

C.A. No. 09A-12-002 WLW

Appellant,

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V.

DELAWARE COUNCIL ON REAL: ESTATE APPRAISERS, :

:

Appellee. :

Submitted: July 1, 2010 Decided: August 3, 2010

OPINION AND ORDER

Upon an Appeal from the Decision of the Council on Real Estate Appraisers.

Reversed and Remanded

Stephen E. Smith, Esquire of Prickett Jones & Elliott, P.A., Dover, Delaware; attorneys for the Appellant.

Patricia Davis Oliva, Esquire, Delaware Department of Justice, Dover, Delaware; attorneys for the Appellee.

WITHAM, R.J.

On December 18, 2009, Appellant Douglas L. Nickel ("Nickel") filed this appeal from the November 17, 2009 decision of the Council on Real Estate Appraisers in and for the State of Delaware (the "Council"). The Council voted to grant Nickel's renewal application for licensure with two conditions: a letter of reprimand and a \$500 fine. Nickel maintains that the Council exceeded its authority by imposing these two conditions.

FACTS

Nickel is a real estate appraiser. The record indicates that he erroneously reported to the State of New Jersey that he was fully compliant with New Jersey's continuing education ("CE") requirements for the 2006-07 renewal period. After conducting an audit, the New Jersey State Real Estate Appraiser Board ("New Jersey Board") concluded that Nickel failed to complete the requisite CEs. The New Jersey Board further concluded that Nickel's improper report constituted misrepresentation. As a result, the New Jersey Board issued a public reprimand and fined Nickel \$1,750.

In September 2009, Nickel, as required, notified the Council that he had been subject to discipline in another state. The Council reviewed Nickel's application for licensure renewal, and, on September 17, 2009, proposed to deny his application, pursuant to 24 *Del. C.* § 4008(a)(2). Nickel requested a hearing. The Council, through a letter dated September 23, 2009, informed Nickel that the requested hearing was scheduled for October 20, 2009.

Nickel was represented by counsel at the hearing. Following his presentation of testimony and evidence in support of his application to renew his license, the

Council deliberated for a period of time. Ultimately, the Council decided to renew Nickel's license, but sanction him both by issuing a public reprimand and imposing a \$500 fine. The Council's decision was memorialized in an Opinion and Order, dated November 17, 2009.

On or about December 18, 2009,¹ Nickel filed his Notice of Appeal and an Emergency Motion for a Stay of Proceedings. The Council did not oppose Nickel's Emergency Motion for a Stay, and, on December 22, 2009, the Court granted the Motion. Along with his Notice of Appeal, Nickel simultaneously filed a Petition for Declaratory Judgment. On March 3, 2010, Nickel filed a Partial Motion for Summary Judgment as to Count III of his Petition for Declaratory Judgment.

Standard of Review²

In reviewing a decision of the Council on Real Estate Appraisers, the Court considers "whether the agency's ruling is supported by substantial evidence and is free from legal error." "Substantial evidence is 'evidence which affords a substantial

¹ The Council's decision was not mailed to Nickel until approximately December 14, 2009.

² In his Opening Brief, Nickel proffers a standard of review for the four separate counts raised in his Petition for Declaratory Judgment. Nickel also sets forth the standard of review for a motion for summary judgment. Although the Court recognizes that the parties disagree over whether Nickel could file a simultaneous Petition for Declaratory Judgment, the matter presently before the Court is Nickel's appeal. Consequently, the Court's analysis will be governed by the administrative appeal standard of review.

³ McCain v. Council on Real Estate Appraisers, 2009 WL 1515594, at *2 (Del. Super.) (citing Phillips v. Div. of Prof'l Regulation, 2004 WL 440414, at *2 (Del. Super.); see also, Berchock v. Council on Real Estate Appraisers, 2001 WL 541026, at *3 (Del. Super.)).

basis of fact from which the fact in issue can be reasonably inferred."⁴ "The Court does not re-weigh the evidence, nor does the Court substitute its judgment for the factual determinations made by the Board or Council below."⁵

DISCUSSION

Nickel raises numerous arguments on appeal. First, Nickel asserts that the Council imposed sanctions contrary to Title 24, Chapter 40 of the Delaware Code. Second, Nickel contends that the Council failed to establish sufficient grounds for discipline. Third, Nickel maintains that the Council failed to conduct the October 20, 2009 hearing in accordance with the Administrative Procedures Act. Fourth, Nickel avers that the Council erred by sanctioning him prior to the expiration of the appeals period. Fifth, Nickel urges this Court to conclude that the Council's sanction is not supported by substantial evidence. Sixth, Nickel advances that the Council violated his constitutional right to Procedural Due Process.

Title 24, Section 4013 of the Delaware Code provides, in pertinent part, that:

(b) Each license or certificate shall be renewed biennially, in such manner as is determined by the Division . . . and proof that the licensee has met the continuing education requirements established by the Council, and shall meet the requirements of § 4008(a)(2), (3), (4) and (5) of this title.⁶

⁴ *Id.* (citations omitted).

⁵ Hoopes v. Del. Council of Real Estate Appraisers, 2006 WL 3308203, at *1 (Del. Super.) (citation omitted).

⁶ 24 *Del. C.* § 4013(b).

Additionally, pursuant to Title 24, Section 4008 of the Delaware Code, an applicant applying for licensure, "[s]hall not have been the recipient of any administrative penalties regarding that applicant's practice as an appraiser" Section 4008 further provides that, "[t]he Council may determine after a hearing whether such administrative penalty is grounds to deny licensure."

It is uncontested that Nickel was sanctioned by the New Jersey Board for failing to satisfy the New Jersey CE requirements. It is further uncontroverted that, due to this failure, and pursuant to Sections 4013 and 4008, the Council had the authority to deny Nickel's application for license renewal. The question, however, is whether the Council had the authority, in exchange for granting Nickel's renewal request, to sanction Nickel for his failure to satisfy the New Jersey CE requirements.

The Council's authority to discipline an appraiser comes from Title 24, Section 4016. Section 4016 provides, in pertinent part, that, "[t]he Council may impose [sanctions], singly or in combination, when it finds that 1 of the conditions or violations set forth in § 4014 of this title applies to a practitioner regulated by this chapter" In the case *sub judice*, the only plausible subsection setting forth grounds for discipline is Section 4014(a)(6). According to Section 4014(a)(6), an appraiser may be disciplined pursuant to Section 4016 if the appraiser,

⁷ 24 *Del. C.* § 4008(a)(2).

⁸ *Id*.

⁹ 24 *Del. C.* § 4016(a).

[h]as had that appraiser's own license or certificate as an appraiser suspended or revoked, or other disciplinary action taken by the appropriate licensing authority in another jurisdiction; *provided, however*, that the underlying grounds for such action in another jurisdiction have been presented to the Council by certified record; and the Council has determined that the facts found by the appropriate authority in the other jurisdiction constitute 1 or more of the acts defined in this chapter.¹⁰

The Council maintains that there is "no dispute that Mr. Nickel violated section 4014(a)(6) and, thus, could be sanctioned under section 4016." In arriving at this conclusion, the Council, however, appears to overlook the requirement in Section 4014(a)(6) that, "the Council has determined that the facts found by the appropriate authority in the other jurisdiction constitute 1 or more of the acts defined in this chapter . . . " The Council imposed the relevant sanctions after concluding that:

despite his significant experience as a licensed appraiser, Mr. Nickel did not appear sufficiently involved in personally making sure that he satisfied the requirements for continued licensure in New Jersey. It is the licensee's responsibility to know what is needed to practice the profession. Mr. Nickel seemed to attempt to deflect that responsibility by asserting that he relied on the representation of others that a course was pending approval, without following up to confirm that approval had been obtained. In addition, he did not provide the New Jersey Board with the requested information in response to its audit, and tried

¹⁰ 24 *Del. C.* § 4014(a)(6) (emphasis added).

¹¹ Appellee's Br. 21.

¹² 24 *Del. C.* § 4014(a)(6).

to avoid the audit altogether by entering into inactive status after the fact. He engaged in misrepresentation when he certified that he had completed the New Jersey continuing education requirements. He offered the excuse that he may have been confused as to whether [certain] courses . . . were approved as continuing education in New Jersey, but did not make any effort to ascertain if they were. Mr. Nickel appeared reluctant to accept his shortcomings in this matter and to freely acknowledge [sic] his accountability. Nonetheless, the Council does not view these failures of Mr. Nickel as warranting, at this time, the removal of his means of livelihood by denying the renewal of his license, and therefore waives the disqualification of 24 Del. C. § 4008(a)(2), conditioned on the issuance of a letter of reprimand and the imposition of a civil penalty in the amount of \$500.00.¹³

Nothing in the Council's decision supports a finding that Nickel's actions in New Jersey constituted one or more of the acts defined in Chapter 40 of Title 24. The Court, therefore, concludes that the Council's decision to impose sanctions is not supported by substantial evidence. That is, the record does not contain evidence sufficient to "afford[] a substantial basis of fact from which [sanctions pursuant to Section 4014] can be reasonably inferred."¹⁴

The Council contends that the sanctions were proper under its inherent authority to place conditions on a license renewal.¹⁵ Assuming, *arguendo*, that the Council is correct, the question is whether this "inherent authority" permits the

¹³ J.A. at N-95-N-96.

¹⁴ See McCain, 2009 WL 1515594, at *2.

¹⁵ Appellee's Br. 32.

Council to impose *any* sanction as a condition to license renewal. The Court concludes that it does not.

Under the Council's theory, despite lacking authority to sanction an appraiser because that appraiser's conduct did not constitute "grounds for discipline," as defined in Section 4014, the Council could nevertheless sanction the appraiser for the same conduct upon his application for license renewal. Section 4008, however, does not support such a conclusion. Instead, as noted above, Section 4008 simply provides that, "[t]he Council may determine after a hearing whether [an administrative penalty] is grounds to deny licensure." If the Council is to impose Section 4016 sanctions, even as a condition to license renewal, the facts must establish "grounds for discipline," as defined in Section 4014.

The Council asserts that such an interpretation of Chapter 40 would render Section 4014(a)(6) meaningless "as no discipline based on any other jurisdiction's statute or regulation could give rise to discipline in Delaware." Again, the Court disagrees. As Nickel opined in his Reply Brief:

[Nickel's] recitation of the plain language of Section 4014(a)(6) does not foreclose Delaware sanctions based on conduct outside the State of Delaware. For example, if an appraiser were sanctioned in New Jersey for being incompetent or negligent in his practice as an appraiser, Delaware could convene a Section 4014 hearing and find the appraiser in violation of Section 4014(a)(6) for conduct out of state that violated

¹⁶ 24 *Del. C.* § 4008(a)(2).

¹⁷ Appellee's Br. 30-31 n. 3.

24 Del. C. § 4014(a)(2). There are numerous scenarios like this.¹⁸

The remaining question is whether the Court must remand the case back to the Council. Nickel urges this Court to reverse the Council's decision. He avers that the record is complete, and, therefore, a remand would be unnecessary and futile. Nickel cites to *Dowling v. Board of Professional Counselors of Mental Health*¹⁹ for the proposition that remand is unnecessary where a further hearing would be futile.

In *Dowling*, the Court concluded that remand was unnecessary because "[t]he decision of the [Board of Professional Counselors of Mental Health] makes it clear that, but for its interpretation of [the relevant statute], [the] appellant would have been granted a license." Contrary to Nickel's assertions, the *Dowling* situation is not the situation presently before this Court. The Court does not find that the Council lacks the authority to sanction Nickel, or that, but for its interpretation of Chapter 40, the Council would not have sanctioned Nickel. Instead, the Court simply concludes that the sanctions imposed were improper, given the record. Thus, the Council should be given an opportunity to conduct further proceedings in accordance with this decision.

The Court agrees with Nickel that, given the history of this case, it would be curious for the Council to deny Nickel's application for license renewal after

¹⁸ Appellant's Reply Br. 7.

¹⁹ 1996 WL 527212 (Del. Super.).

²⁰ *Id.* at *8.

previously determining that such denial was not warranted.²¹ Nevertheless, it is not appropriate for this Court to "re-weigh the evidence . . . [or] substitute its judgment for the factual determinations made by the Board or Council below."²²

Given this decision, the Court does not need to address Nickel's remaining arguments. The Court does, however, note that there remain issues regarding the appropriateness of Nickel's simultaneous Petition for Declaratory Judgment. During an office conference on March 11, 2010, the Court instructed the parties to address whether Nickel's filing is appropriate in their briefing on appeal.

The Council opted not to address this issue in its Answering Brief. Consequently, the Court will not decide the issue. Nickel's Motion for Partial Summary Judgment in the Declaratory Judgment action, therefore, is still pending before this Court. The parties are instructed to contact my civil case manager to schedule this motion. To the extent that the Declaratory Judgment filing is improper or otherwise rendered moot by this Court's decision on appeal, those arguments should be raised at that time.²³

²¹ J.A. at N-96.

²² Hoopes, 2006 WL 3308203, at *1.

²³ Although the Court, at this time, does not decide whether Nickel's Declaratory Judgment filing was appropriate, the Court does direct the parties' attention to *JNK*, *LLC v. Kent County Reg. Planning Comm.*, 2007 WL 1653508, at *4 (Del. Super.) (noting that "a civil action cannot be contemplated until the Appellant exhausts or abandons its administrative remedies, which include an appeal to this Court").

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CONCLUSION

For the foregoing reasons, the decision of the Council on Real Estate Appraisers in and for the State of Delaware is **REVERSED**. The matter is **REMANDED** for further proceedings in accordance with this opinion.

IT IS SO ORDERED.

/s/ William L. Witham Jr.
Hon. William L. Witham, Jr.

WLW/dmh

oc: Prothonotary

xc: Counsel